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Authorities Cited

Cases Cited

STATUTES CITED

NO. . . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1941

OTTO ROSE,
Petitioner and Appellant Below,
VERSUS
UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Otto Rose, the petitioner herein, and respectfully prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Tenth Circuit, entered on May 19, 1942, and that thereafter, and on June 4, 1942, appellant filed his petition and brief for rehearing, said petition and brief was on the 16th day of June, 1942, denied, and that thereafter, and on June 26, 1942, said Court, acting under, by, and through Honorable ORIE L. PHILLIPS, Circuit Judge, and Honorable J. FOSTER SYMES, District Judge, caused to be entered an order staying the mandate of said Court for a period of thirty days from and after June 26, 1942, providing that if within such time there be filed with the clerk of that Court a certificate of the Clerk of the Supreme Court of the United States,

that a petition for writ of certiorari, record and brief shall have been filed with proof of service, as required, by the rules of that Honorable Court, and providing further for a continuance until the final disposition of the case by the Supreme Court of the United States of America.

STATEMENT OF FACT

The cause herein presented is an appeal from the judgment of the Circuit Court of Appeals for the Tenth Circuit wherein the said Circuit Court of Appeals upheld a judgment of conviction against this petitioner. Petitioner was tried and convicted for a violation of Section 145, Title 26, U. S. C. A. on two counts; one charging a violation of said act for the year 1936, and the other charging a violation of said act for the year 1937, all of which said indictment is set forth at pages 3 to 9 of the printed record filed herewith.

It will be further observed that from time to time, and until said case was finally heard, various motions were filed, which said motions, and more particularly, the motion for a bill of particulars, are set forth in the printed record herewith submitted.

OPINIONS BELOW

Petitioner and appellant would further show that heretofore and on the 24th day of April, 1941, he was found guilty by a jury in the District Court of the United States in and for the Western District of the State of Oklahoma. That thereafter, petitioner and appellant caused to be filed

a proper motion for a new trial, notice of appeal, and various other motions, all of which as are by law and rule required, and which are set forth and shown in the printed record filed herewith.

BASIS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked upon the grounds and for the reasons:

(1)

That heretofore and to-wit on the 19th day of May, 1942, the Circuit Court of Appeals for the Tenth Circuit of the United States of America has decided a question which is directly in conflict with the case of *Singer* v. *United States,* reported at 58 Fed. (2d) page 74.

(2)

That the said Circuit Court of Appeals has decided an important question of general law in a way probably untenable and/or in conflict with the weight of authority in that the said Circuit Court of Appeals in determination of the case at bar has further held and attempted to apply the rule of harmless error, all of which is in conflict with the general law of the land, and especially in conflict with the cases of *Miller* v. *Territory of Oklahoma,* C. C. A., 149 Fed. 330-339, and *Coulston* v. *United States,* 51 Fed. (2d) 178-182, "which said cases will hereinafter be directed to the attention of the Court."

"Petitioner further alleges and believes the fact to be that the Circuit Court of Appeals has so far departed from the accepted and usual course of jurisdictional proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision in this, to-wit: that said Court in passing upon the application for a bill of particulars holds that although the defendant, if a seasonable application therefore be made, is entitled to the same, and yet at the same time undertakes to apply the rule of harmless error, all of which is objectionable under the law." Yet the Court holds that the guilt of petitioner was apparent and that the action of the trial court was harmless.

Accompanying this petition is a certified transcript of the printed record, including the proceedings in the Circuit Court of Appeals.

PRAYER AND CONCLUSION

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings, if any there be that are not accompanied by the copies filed with this petition, in cause Number 2316, wherein Otto Rose, petitioner herein, was appellant, and the United States of

America was the appellee, to the end that this cause may be reviewed and determined by this Court as is provided for by the Statutes of the United States, and that the judgment herein of said Court be reversed by this Court, and for such other relief as to this Court shall seem mete and proper.

Respectfully submitted,

OTTO ROSE,
Petitioner,

By: EDWARD M. BOX,
His Attorney.

July, 1942.

NO. .....

In the Supreme Court of the United States

OCTOBER TERM, 1941

OTTO ROSE,
Petitioner and Appellant Below,
VERSUS
UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Now comes the petitioner herein and appellant below and submits this his brief in support of the foregoing petition for writ of certiorari. The original opinion upon which this petition is requested was entered on the 19th day of May, 1942. Thereafter appellant in the court below filed his petition and brief for rehearing, all of which was on the 16th day of June, 1942, denied, and thereafter on June 26, 1942, the Court, acting through Judges PHILLIPS and SYMES, caused to be entered an order staying the mandate of said Court for a period of thirty days from and after said date, said opinion appearing at pages 89-95, being attached to the printed record herewith submitted, and the order staying mandate appearing at page 100 of the printed record.

JURISDICTION

Petitioner herein seeks a review by certiorari under Section 240a, of the Judicial Code as amended in 28 U. S.

C. A., para. 347, of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, heretofore entered on the 19th day of May, 1942. The essential facts are that heretofore and on March 5, 1941, petitioner herein was indicted on two separate counts and charged with a violation of Section 145, Title 26, U. S. C. A., said counts charging that during the years 1936 and 1937 said petitioner undertook to and did evade the payment of certain income taxes, all of which is set forth and shown at pages 3 to 9, inclusive of the printed record herewith filed. That thereafter and on the 20th day of March, 1941, a demurrer, together with a motion for a bill of particulars, was filed in the United States District Court in and for the Western District for the State of Oklahoma, all as is shown at pages 9 to 11 of the printed record, which said demurrer and motion were, by the Court, overruled and exceptions duly taken.

Thereafter said cause came on for trial and on the 24th day of April, 1941, a verdict was rendered by a jury, finding petitioner guilty as charged in both counts in the indictment contained, all as is shown at page 12 of the printed record. Upon the rendition of said verdict, and after motion duly filed for a new trial, this petitioner was sentenced by the Court below to serve a term in some penitentiary to be designated of five years upon each count, said terms to run consecutively. Thereafter, said cause was duly and properly appealed to the Circuit Court of Appeals in and for the Tenth Circuit, which said judgment has been hereinabove referred to and is set forth in the printed record as aforesaid and in which said judgment, the said Circuit

Court of Appeals sustained the judgment of the United States District Court in and for the Western District of the State of Oklahoma.

SPECIFICATIONS OF ERROR

(1)

That the Honorable Circuit Court of Appeals erred in the rendition of its judgment for that the Court failed to give proper consideration to the case of *Singer* v. *United States*, 58 Federal Reporter (2d), page 74, and numerous other cases therein and hereinafter cited, wherein it was held that this defendant was and would have been entitled to a bill of particulars, all as was timely requested from the trial court, and by said court denied.

(2)

That the Honorable Circuit Court of Appeals in and for the Tenth Circuit, erred in holding that the testimony of one H. C. Jones, in reference to income tax returns for the years 1935 and 1938, were harmless, irrelevant, and incompetent, for that the said testimony is directly in conflict with the Singer case *supra*, and the case of *Miller* v. *Territory of Oklahoma*, C. C. A., 149 Fed. p. 330-339, and *Coulston* v. *United States*, C. C. A., 51 Fed. (2d) 178-182.

(3)

That the Honorable Circuit Court of Appeals wholly failed to give attention to exhibits set forth at pages 57-85 as is set forth and shown in the printed record herein filed, all of which said exhibits come within the purview of the cases hereinabove and hereinafter set forth, and which are

not relevant to the trial of this cause and could not come within the realm of harmless error, or be considered as a reasonable exercise of the discretion of the trial court.

(4)

That the Honorable Circuit Court of Appeals, in the final paragraph of said judgment rendered, finds and holds in substance, that the fixing of penalites for a criminal offense is a legislative function, and that *ordinarily,* a sentence within the limits of the applicable statute will not be disturbed.

We maintain and we submit to this Honorable Court that this case herein is not an ordinary case, and that if this Honorable Court will review the cases precedent to this case, and all growing out of the same sort of transactions and to which reference is made in the briefs filed herein in the Court below, it will be ascertained and determined that the punishment imposed upon this petitioner is harsh, cruel, and unusual, and that the same should not have been, under the circumstances, assessed against him.

ARGUMENT

Proposition No. I.

That the Honorable Circuit Court of Appeals erred in the rendition of its judgment for that the Court in the case of *Singer* v. *United States*, 58 Federal Reporter (2d) page 74, and numerous other cases therein and hereinafter cited, wherein it was held that this defendant was and would have been entitled to a Bill of Particulars, all as was timely requested from the trial court.

In the presentation of the argument, we desire herewith to call this Honorable Court's attention to the case of *Singer* v. *United States,* 58 Fed. (2d) 74. In that case, with the exception of the amounts involved, the judgment of the Court and the findings made by said Court, were so similar that we present herewith a part of the findings and holdings of the Court.

It will be noted that the Honorable Circuit Court of Appeals said:

> "This is an appeal from a judgment of the District Court entered upon the verdict of a jury convicting the appellant of attempting to defeat and evade a tax upon his income for the year 1926 in violation of section 1114(b) of the Revenue Act of 1926 (26 U. S. C. A., Sec. 1266).
>
> "The defendant was indicted and charged with receiving a net income of $400,338.90 on which he should have paid an income tax of $92,018.49, but instead he filed a return showing no net income.
>
> "His alleged income aggregating $409,788.90 was made up as follows:

Commissions	$ 1,200.00	
Interest	300.00	
Profit from sale of real estate	15,250.00	
Income from partnership	163,570.26	
Other income	240,635.19	$420,955.45
Business Loss—		
Restaurant	9,926.55	
Loss on rent item	1,240.00	11,166.55
Total income		$409,788.90

"From this sum was deducted $9,450 allowance for interest, taxes, contributions, and personal exemptions, which left a net balance of $400,338.90."

The learned Court in passing upon the right of the appellant in that case made the following statement:

"When it appears that the indictment does not inform the defendant with sufficient particularity of the charges against which he will have to defend at the trial, he is entitled to a bill of particulars, if seasonal application is made therefor. The defendant may demand this as a matter of right, even though the indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced bad on motion to quash or demurrer, where the charge is couched in such language that the defendant is liable to be surprised and unprepared. *Tilton* v. *Beecher*, 59 N. Y. 176, 184, 17 Am. Rep. 337; *Watkins* v. *Cope*, 84 N. J. Law 143, 147, 86 A. 545; *State* v. *Bove*, 98 N. J. Law, 350, 353, 116 A. 766; *United States* v. *Eastman* (D. C.), 252 F. 232; *Wilson et al.* v. *United States*, 275 Fed. 571; *Filiatreau* v. *United States*, 14 Fed. (2d) 659 (C. C. A. 6); *Lett* v.

United States, 15 Fed. (2d) 686 (C. C. A. 8); *O'Neill* v. *United States,* 19 Fed. (2d) 322, 324 (C. C. A. 8).

"The indictment in this case did not inform the defendant with such particularity of what he had to meet at the trial as to enable him to prepare his defense without surprise and embarassment. A reading of the record shows this conclusion to be inescapable. The frequent interruptions of the trial to enable the government to give the defendant the information which would have been contained in a bill of particulars show that he was surprised, could not properly prepare his defense, and that his motion for a bill of particulars should have been allowed. For example, the defendant did not know what was meant by the item, 'other income $240,635.19.' It could have meant other income from any source whatever. When the government replied to the defendant's letter stating that it was 'unidentifiable income obtained by an examination of his bank deposit, together with such other records as the books disclose,' it did not give him any real information as to what this income was—what deposit, what records, and what books were not disclosed. The government could not state what constituted the 'other income' without showing the falsity and untenable character of the charge. This item was not set forth with such definiteness and particularity as to enable the defendant to plead it in bar to another prosecution for the same crime."

And in conclusion used this very apt and pertinent language:

"Innocent men may be indicted and convicted, and guilty men may be acquitted, but both good and bad men are alike entitled to the application of the rules of evidence which courts throughout the ages have found to be best for the fair and impartial administra-

tion of the law. When these rules, under the stress and strain of a trial, have been violated, it does not cure the injury to reply with the stereotyped argument that it does not appear it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless."

Miller v. *Territory of Oklahoma* (C. C. A.), 149 Fed. 330, 339, 9 Ann. Cas. 389;

Coulston v. *United States* (C. C. A.), 51 Fed. (2d) 178, 182.

But said Court undertakes to distinguish this case from the Singer case *supra*. The Court's attention is further directed to the fact that the Singer case has been twice followed in the opinions written by Judge KENNEDY of the Wyoming District, same being *United States* v. *Empire Paper Corporation et al.*, and two consolidated cases, 8 Federal Supplement 220, and again in the *United States* v. *Clausen*, 13 Fed. Sup., pages 178-181. This case was again cited in the case of the *United States* v. *Ferrington*, 11 Federal Supplement 215, wherein Judge JOHNSON of the United States District Court in the State of Pennsylvania, in a well reasoned opinion follows the rule as set forth in the Singer case. It appears that in only one case which the writer has been able to find that does not clearly and concisely follow the Singer case, and have the approximate facts in issue, is the *United States* v. *Wexeler*, 6 Federal Supplement at page 250, in which said case, the Honorable Court took issue with the Singer case, and in connection,

said that he was not in sympathy with the reasoning of the Singer case, and since the same did not originate in his District, he respectfully declined to follow the same.

It is apparent that the government and the Honorable Court below rely upon other cases not involving the same issues as are involved herein, as for instance, the case of *Wong Tai* v. *United States,* which said case is reported at 273 U. S. Repts. 77, Supreme Court Reporter, Vol. 47, page 300; Syllabus No. 5 of said case reads as follows to-wit:

> "Application for bill of particulars is addressed to sound discretion of trial court, whose action thereon should not be disturbed in absence of abuse of discretion."

It will be noted that this case was decided on January 3, 1927, while the Singer case, upon which this petitioner relies, was decided finally on April 2, 1932. It is apparent that there is such a wide divergence between the cases and the circumstances surrounding the same, that the rule announced in the Wong Tai case *supra* should not be the controlling case. It would also be noted that the rule laid down in *Hood* v. *United States,* 76 Fed. (2d), page 275, refers also to an opium case, as did *Hood* v. *United States,* 78 Fed. (2d), page 150. Both of which said cases were tried before the Honorable EDGAR S. VAUGHT, Trial Judge in the Court below and it is maintained that the said Court, having established a line of reasoning in the so-called "dope cases," abused his discretion in the case at bar, in that he relied upon those cases as being controlling.

Proposition No. II.

That the Honorable Circuit Court of Appeals in and for the Tenth Circuit, erred in holding that the testimony of one H. C. Jones, Collector of Internal Revenue, to income tax returns for the years 1935 and 1938, were harmless, irrelevant, and incompetent, for that the said testimony of the said H. C. Jones, Collector of Internal Revenue, is directly in conflict with the Singer case *supra*, and the case of *Miller* v. *Territory of Oklahoma*, C. C. A. 149, Federal, pages 330-339, and *Coulston* v. *United States*, C. C. A. 51 (Federal 2d) 178-182.

This Proposition is clearly set forth in Proposition No. I, and will therefore not be repeated here except to redirect the attention of this Honorable Court to the Singer case and the quotations from the above cases therein contained.

In view of these authorities, we respectfully maintain that the lower Court erred in conceding without deciding that the testimony of the said H. C. Jones, although incompetent and irrelevant to the issues, constituted harmless error, for that the Trial Court, as is shown at page 30 of the printed record herewith submitted, states as follows:

> By the Court:
>
> "That is on the theory that the returns of 1935 and 1938 may be material as showing the continuance of the income and conduct."

Exceptions allowed.

It is therefore apparent that the Court, having once suggested that there might be a continuance of wrong doing upon the part of the defendant, it became and was the plain duty of the Court, even without request to cor-

rect the error, if possible the same could be corrected, and withdraw from the minds of the jurors the impression that might have been made by the improvident remarks of the Court. This question was noted by the Honorable Circuit Court of Appeals, and the following cases were cited: *Bogileno* v. *United States*, 38 Fed. (2d) 584; *Reynolds* v. *United States*, 48 Fed. (2d) 762; *Strader* v. *United States*, 72 Fed. (2d) 589; *Hayes* v. *United States*, 112 Fed. (2d) 676; *Miller* v. *United States*, 120 Fed. (2d) 968, but the Honorable Court maintains that such an erroneous and improvident statement upon the part of the Trial Court, was not plainly and clearly prejudicial to the rights of this petitioner.

It is respectfully submitted that the action upon the part of each of the Courts below was erroneous and prejudicial and in substance, had the effect of depriving this petitioner of his constitutional rights to a fair and impartial trial, and will, unless this writ is granted, have the effect of depriving him of his liberty without due process of law.

Proposition No. III.

That the Honorable Circuit Court of Appeals wholly failed to give attention to the exhibits set forth at pages 57-85, as is set forth in the printed record, all of which said exhibits were and are in the judgment of this petitioner, incompetent, irrevelant, and immaterial, wholly prejudical, had no relation to the issues involved in the trial of this cause, and could not come within the realm of harmless error, or be considered as a reasonable exercise of the discretion of the trial court.

The authorities covering this question have been fully set forth hereinbefore. This Proposition is submitted upon the argument made in Propositions No. I and No. II, and the Honorable Court's attention is hereby directed to the said exhibits as is set forth in the printed record.

Proposition No. IV.

That the Honorable Circuit Court of Appeals, in the final paragraph of said judgment rendered, finds and holds in substance, that the fixing of penalties for a criminal offense is a legislative function, and that *ordinarily*, a sentence within the limits of the applicable statute will not be disturbed.

It will be noted that in the concluding paragraph of the Honorable Circuit Court of Appeals' opinion, the statement is made that this question deserves brief notice. We do not contend that the Court below is wrong as a matter of law, but we sincerely maintain that upon an examination of the record as herein set out, that this is not an ordinary case, and that the record will disclose to the Court, upon proper review, that the punishment attempted to be imposed by the Court was harsh, cruel, and unusual.

CONCLUSION

This petitioner, therefore, respectfully urges that the judgment of the Circuit Court of Appeals, sustaining the judgment of the trial court, is contrary to the decisions of this Court and other Courts of competent jurisdiction, and that for the reasons set forth in the petition and this brief herewith submitted, a writ of certiorari should be granted as prayed for in the petition.

Respectfully submitted,

OTTO ROSE,
Petitioner,

By: EDWARD M. BOX,
His Attorney.

July, 1942.

⊙

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS
Tenth Circuit

No. 2316—March Term, 1942

Otto Rose, Appellant, *vs.* United States of America, Appellee

Appeal From the District Court of the United States for the Western District of Oklahoma.

(May 19, 1942.)

Edward M. Box (L. E. McElroy was with him on the brief) for Appellant.

Charles E. Dierker, United States Attorney (Samuel O. Clark, Jr., Assistant Attorney General, and Joseph P. O'Connell, Special Assistant to the Attorney General, were with him on the brief) for Appellee.

Before PHILLIPS, BRATTON and HUXMAN, Circuit Judges.

BRATTON, Circuit Judge

The indictment in this case contained two counts. The first charged that for the calendar year 1936 appellant received as gross income "Fees $78.60, Rents 4,298.85, Royalties 51.26, Other Income 7,249.36, Total $11,678.07," and that for the purpose of evading and defeating income taxes he falsely returned as gross income "Fees $78.60, Royalties 51.26, Rents 4,367.60, Total $4,497.46"; and the second charged that for the calendar year 1937 he received as gross income "Interest Received $11.25, Oil Royalties 8.16, Rents 4,408.36, Other Income 14,458.25, Total $18,886.02," and that for like purpose he falsely returned as gross income

"Royalties $8.16, Rents 3,809.61, Capital Gains 975.08, Total $4,792.85." He was found guilty on both counts, and sentenced to a term of five years on each, with provision that the two sentences should run consecutively.

Error is assigned upon the overruling of a demurrer to the indictment on the ground that it failed to charge facts sufficient to constitute an offense under the laws of the United States and was so indefinite and uncertain that it failed to sufficiently acquaint appellant with the nature of the charge. The recognized yardstick for measuring the sufficiency of an indictment when challenged by demurrer is whether it contains the elements of the offense intended to be charged against the accused, and sufficiently apprises him of the nature of the specific charge to enable him to prepare his defense and to plead the judgment in bar to any later proceeding against him based on the same offense. *United States* v. *Behrman*, 258 U. S. 280; *Hagner* v. *United States*, 285 U. S. 427; *Weber* v. *United States*, 80 Fed. (2d) 687; *Crapo* v. *United States*, 100 Fed. (2d) 996; *Graham* v. *United States*, 120 Fed. (2d) 543; *Travis* v. *United States*, 123 Fed. (2d) 268. Each count in this indictment charged the essential elements of the offense in substantially the language of the statute. That was sufficient to sustain the indictment against the demurrer. *Capone* v. *United States*, 56 Fed. (2d) 927, certiorari denied, 286 U. S. 553.

Appellant also filed a motion for a bill of particulars as to each count in the indictment showing a break-down or recapitulation of each item of income and indicating with particularity the source from which it was contended such

income had been derived or received. The motion was denied, and that action of the court is challenged. A motion or other appropriate request for a bill of particulars enlarging upon an indictment in a criminal case is addressed to the sound judicial discretion of the trial court, and the action taken thereon will not be disturbed on appeal, except where such discretion was abused. *Rosen* v. *United States,* 161 U. S. 29; *Dunlop* v. *United States,* 165 U. S. 486; *Wong Tai* v. *United States,* 273 U. S. 77; *Parnell* v. *United States,* 65 Fed. (2d) 324; *Hood* v. *United States,* 76 Fed. (2d) 275; *Hood* v. *United States,* 78 Fed. (2d) 150; *Gates* v. *United States,* 122 Fed. (2d) 571; *Price* v. *United States,* 68 Fed. (2d) 133, certiorari denied 292 U. S. 632; *Paschen* v. *United States,* 70 Fed. (2d) 491.

The bill should have been furnished in respect to the item "Other Income" in each count. But an appellate court will not reverse judgment on account of the improvident denial of a motion for such a bill unless it appears from the whole case that the accused suffered substantial prejudice, either by surprise at the proof introduced against him or in some other manner. *Lett* v. *United States,* 15 Fed. (2d) 686; *Peck* v. *United States,* 65 Fed. (2d) 59, certiorari denied, 290 U. S. 701; *Williams* v. *United States,* 93 Fed. (2d) 685; *Lucas* v. *United States,* 104 Fed. (2d) 225; *Landay* v. *United States,* 108 Fed. (2d) 698, certiorari denied, 309 U. S. 681.

In *Singer* v. *United States,* 58 Fed. (2d) 74, the judgment was reversed for failure to require the furnishing of a bill of particulars. There the indictment charged the

receipt of income in excess of $400,000, and that two items making up the total were, "Income from partnership $163,-570.26, Other Income $240,635.69." It developed on the trial that the charges contained a great number of irrelevant figures; there was much confusion in an attempt to unravel the facts; several interruptions of hours each were necessary during the trial; a government witness testified that from records which had been introduced in evidence, he could state the amount of the income of the accused, and that it was more than $400,000; yet through the information brought out in the course of cross examination, and the facts which the court required the government to give to the accused, almost $300,000 was eliminated from the total amount, as charged, and the entire item of "Other Income" of $240,635.69, except about $10,000, was eliminated in the course of the trial as taxable income. Looking at the entire picture in retrospect the court concluded that the indictment did not inform the defendant with sufficient particularity to enable him to prepare his defense without surprise and embarrassment; and that the greatly exaggerated allegations in respect to amounts, the confusion, and the interruption in an effort to unravel the facts, all considered together, prejudiced him. But here an entirely different situation is presented. Appellant was a member of the Board of Education of Oklahoma City; the indictment was based primarily upon his failure to return for income tax purposes income received in the form of bribes for action by the Board of Education; the entire proof of the government was confined to less than twenty specific sums in cash delivered to him, all representing bribes; no evidence

was offered respecting interest, fees, rents, royalties, or other revenue. There was no large multiple of involved transactions, no great mass of complicated figures, no confusion, and no interruptions of the trial for the purpose of exploring facts and figures. The misconduct of appellant and other members of the Board of Education had given rise to the institution and prosecution of ouster proceedings in the state court, and the attorney for the Board had been indicted and sentenced to the state penitentiary for his participation in one transaction involving bribery of members of the Board. Four other members of the Board were likewise indicted in the court below for failure to return for income tax purposes money received as bribes, final disposition was made of their cases, and it is stated in the brief of appellant that great publicity was given to the series of companion cases. And according to testimony which bears the earmarks of credence, appellant sought to induce one person who had paid him bribe money to give prejured testimony in respect to the matter and as an inducement stated "that he would be taken care of." It is clear that appellant knew or had reason to believe that the item "Other Income" in each count of the indictment referred to money received as bribes; there was no suggestion during the trial that for want of the information requested in the motion for the bill he was unprepared to meet the testimony relating to such bribes; there was no request for a postponement in order to meet it; and there is no convincing suggestion now that if the bill had been furnished he could have produced additional or different testimony or could have prepared differently for the trial. It does not

appear from the whole record that the denial of the application for the bill in anywise substantially prejudiced appellant. And in such circumstances its denial does not call for a reversal of the judgment. *Wong Tai* v. *United States, supra; Price* v. *United States, supra; Paschen* v. *United States, supra; Peck* v. *United States, supra; Lucas* v. *United States, supra; Landay* v. *United States, supra.*

The income tax returns of appellant for the years 1935 and 1938 were offered in evidence. The only objection interposed to their admission was that they were incompetent, irrelevant, and immaterial. In overruling the objection, the court stated that they were admitted on the theory that they might be material as showing the continuance of the income and conduct. No further reference was made to such returns throughout the entire trial. The trial concerned itself with transactions involving the giving of bribes in 1936 and 1937. It may be conceded, without deciding, that the returns were not admissible in evidence, and that there was no occasion for the statement of the court. But the guilt of appellant was clearly shown by competent evidence, and it is transparently plain that the introduction of the returns and the statement of the court made in connection therewith were harmless.

An Internal Revenue agent sat in the courtroom and heard the testimony introduced with respect to the several sums paid to appellant as bribes, and he later testified concerning the amount of the tax which would have been due if appellant had made a true return of his gross income for each year in question. After being cross examined at

length, the attorney for appellant stated that he desired to ask the witness one more question. He then asked whether appellant paid the tax on an item of $9,000. The witness answered in the negative, and he was immediately asked whether the item was included in the return. The court thereupon stated to the attorney for appellant that he was through, that he had asked the witness a question and it had been answered, and that he could not argue the matter with the witness. No objection was made or exception taken. Even so it is now complained that the court improperly cut off further cross examination. The court merely stopped cross examination in respect to the particular item, and it had been fully covered. There was no denial of further cross examination respecting other matters about which the witness had testified on direct examination. Furthermore, the extent of cross examination rests largely in the discretion of the trial court, and there was no abuse of such discretion in this instance.

Appellant further complains that the testimony of the expert witness in respect to the amount of the tax due was prejudicial because it was based in part upon assumptions of the receipt of money which had no basis in the evidence. The burden rested on the government to prove that appellant owed an income tax for the years in question over and above the amount returned and paid. But the amount of the tax was not the gist of the offense and it was not essential that it be proved in the exact amount charged. *United States* v. *Schenck*, 126 Fed. (2d) 702. The testimony did not invade the province of the jury. *Gleckman* v. *United States*, 80 Fed. (2d) 394, certiorari denied, 297 U. S. 709.

And the question of its inaccuracy because based upon assumptions of the receipt of money which had no support in the evidence merely went to its weight and was therefore for the jury.

Other parts of the testimony offered by the government is questioned, either on the ground that it was incoherent and incomprehensive or was given by persons who admitted that they had testified falsely on earlier occasions, or both. It would not serve any useful purpose to detail the several parts of the evidence or to discuss them *seriatim*. It is enough to say that the contentions go to the weight of the testimony, not its admissibility.

The next proposition, stated but not amplified or argued, is that the court erred in overruling the motion for a directed verdict of not guilty. The evidence adduced by the government, if believed, was abundantly sufficient to establish the guilt of appellant as charged in the indictment. His own testimony and that of other witnesses offered by him formed certain issues of fact, but they were for the jury.

The further proposition, likewise stated but not followed by amplification or argument, is that when the court came in its instructions to analyze the testimony of the various witnesses it failed to analyze or give proper emphasis to the testimony of appellant and the witnesses called in his behalf, and that the instructions as a whole tended to permit the jury to believe the testimony of admitted prejurers and bribe-givers to the exclusion of a reasonable emphasis upon the testimony of appellant and

that of others who testified in his behalf. No objections were interposed or exceptions taken to the instructions, and no requested instructions were tendered. Where life or liberty is involved, an appellate court may notice and correct a serious error in the instructions which was plainly prejudicial, even though it was not called to the attention of the trial court. *Bogileno* v. *United States*, 38 Fed. (2d) 584; *Reynolds* v. *United States*, 48 Fed. (2d) 762; *Strader* v. *United States*, 72 Fed. (2d) 589; *Hayes* v. *United States*, 112 Fed. (2d) 676; *Miller* v. *United States*, 120 Fed. (2d) 968. But no such error is present here.

Complaint is predicated upon the denial of the motion for new trial. The granting or denial of such a motion rests in the sound judicial discretion of the trial court, and ordinarily it is not subject to review on appeal. *Holmgren* v. *United States*, 217 U. S. 509; *Evans* v. *United States*, 122 Fed. (2d) 461. Nothing appears in the record which takes this case out of that general rule.

The final contention which merits brief notice is that the punishment imposed was unusual, harsh and cruel, and not justified or sustained by the purported facts adduced at the trial. Each count in the indictment charged a separate offense under 26 U. S. C. A. (P) 145(b); and the maximum penalty fixed by the statute for each offense is a fine of not more than $10,000, or imprisonment for not more than five years, or both. The fixing of penalties for criminal offenses is a legislative function, and ordinarily a sentence within the limits of the applicable statute will not be disturbed on appeal for being unusual, excessive, or cruel.

Schultz v. *Zerbst*, 73 Fed. (2d) 668; *Reavis* v. *United States*, 106 Fed. (2d) 982; *Moore* v. *Aderhold*, 108 Fed. (2d) 729; *McCleary* v. *Hudspeth*, 124 Fed. (2d) 445.

AFFIRMED.

A true copy

Attest: Robert B. Cartwright, Clerk
United States Circuit Court of Appeals,
Tenth Circuit,

Clerk U. S. Circuit Court of Appeals, Tenth Circuit,

By: George A. Pease
Deputy Clerk.

(Seal.)

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 222

OTTO ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 89–95) is not yet reported. The District Court rendered no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 19, 1942 (R. 95). A petition for rehearing was denied on June 16, 1942 (R. 111). The petition for a writ of certiorari was filed on July 11, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code,

as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases. Cf. *Craig* v. *United States*, 298 U. S. 637.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in denying petitioner's motion for a bill of particulars.

2. Whether it was reversible error to admit into evidence certain exhibits including personal income tax returns of the petitioner for years other than those covered by the indictment.

3. Whether the sentence imposed upon petitioner is cruel and unusual.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 145. PENALTIES

* * * * *

(b) * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

On March 5, 1941, petitioner was indicted in the Western District of Oklahoma under two counts which charged that he willfully attempted to evade and defeat specified large portions of his income tax liability for the calendar years 1936 and 1937, respectively (R. 3–9). Petitioner was tried before a jury, was convicted upon both counts, and was sentenced to imprisonment for five years on each count, the sentences to run consecutively (R. 13–14). The judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit (R. 95) and a petition for rehearing was denied (R. 111).

The petition for writ of certiorari raises no question as to the sufficiency of the evidence to support the verdict and the record filed in this Court does not include a complete transcript of the proceedings at the trial. (See R. 111–112.) From those portions of the evidence which are included in the record (R. 29–86) and from the opinion of the court below (R. 89–95), it appears, however, that petitioner was Chairman of the Board of Education of Oklahoma City and that the Government proved that he failed to return as income specific amounts of money which he had received in the form of bribes for action by the Board of Education. It appears also that there was testimony that petitioner sought to induce a Government witness to give perjured testimony concerning a transaction in which he had paid petitioner a bribe (R. 91–92).

The issues raised by the petition herein relate to the validity of the action of the trial court in denying a motion for a bill of particulars filed by petitioner (R. 11) and in admitting certain evidence, and to the propriety of the sentence. The facts pertinent to these questions will be stated in the Argument.

ARGUMENT

1. The indictment charged that during the taxable years petitioner received income as follows (R. 4, 6):

1936		*1937*	
Fees	$78.60	Interest Received	$11.25
Rents	4,298.85	Oil Royalties	8.16
Royalties	51.26	Rents	4,408.36
Other Income	7,249.36	Other Income	14,458.25
Total	$11,678.07	Total	$18,886.02

It further charged that with intent to evade $465.44 on his tax for 1936 and $1,285.14 on his tax for 1937 he reported only the following income in his returns (R. 5, 7–8):

1936		*1937*	
Fees	$78.60	Royalties	$8.16
Royalties	51.26	Rents	3,809.61
Rents	4,367.60	Captial Gains	975.08
Total	$4,497.46	Total	$4,792.85

By his motion for a bill of particulars, petitioner sought to have each of the items of income alleged to have been received by him broken down to show the particular source from which it was derived

(R. 9–10).[1] The trial court's denial of this motion is contended to be reversible error. The circuit court of appeals stated that a bill should have been furnished with respect to the items of "Other Income" to which the Government's proof alone related (R. 90), but held that petitioner suffered no substantial prejudice and that, therefore, the error was not ground for reversal. This conclusion is clearly correct and does not conflict with the decision in *Singer* v. *United States,* 58 F. (2d) 74 (C. C. A. 3), relied on by petitioner. See *Wong Tai* v. *United States,* 273 U. S. 77; *Dunlop* v. *United States,* 165 U. S. 486; *Rosen* v. *United States,* 161 U. S. 29.

As the court below pointed out in its opinion (R. 91–92), there were in the instant case circumstances indicating that petitioner knew or had reason to believe in advance of the trial that the items "Other Income" referred to moneys received by him as bribes for action by the Board of Education. And at no time during the trial did petitioner claim that he was surprised by the Government's evidence with respect to the bribes or seek to obtain a postponement in order to prepare his defense more fully. Nor does petitioner now allege or make any showing that he was prejudiced

[1] Petitioner also filed a demurrer to the indictment on the ground that the allegations of the items of "Other Income" were indefinite and uncertain (R. 10–11). The overruling (R. 11) of the demurrer is not now alleged as error.

by the denial of his motion for a bill of particulars. Accordingly, the facts are quite different from those in the *Singer* case, where the refusal of a bill of particulars was held to have been prejudicial.

The indictment in that case charged the taxpayer with various items of income including "Other income $240,635.19." Most of this amount was eliminated at the trial, but the facts were confused and frequent interruptions were required to acquaint the defense with information to which it was entitled in advance. The appellate court concluded from all the circumstances that the taxpayer "could not properly prepare his defense, and was not in a position to keep from the jury the great mass of prejudicial evidence" which was introduced by the Government in support of its inaccurate general allegations. 58 F. (2d) at 76.

2. Petitioner contends (Pet. 3, 9, 16–18) that it was harmful error for the trial court to have admitted into evidence testimony of a collector of internal revenue concerning petitioner's tax returns for 1935 and 1938. The record indicates that the collector was called to the stand to identify the returns for those years and that the returns were admitted upon stipulation that they were authentic (R. 29). However, it does not show any testimony by the collector. Nor do the returns appear in the record filed herein. Moreover, since there is no question as to authenticity, the admis-

sion of the returns was proper as bearing upon petitioner's intent to evade taxes. *Lisansky* v. *United States*, 31 F. (2d) 846 (C. C. A. 4), certiorari denied, 279 U. S. 873.[2]

The exhibits introduced by the Government and set forth at pages 57–85 of the record are objected to as being incompetent, immaterial, and prejudicial (Pet. 18). No basis for these general objections is alleged or shown, however, and the exhibits properly were admitted as part of the proof of petitioner's income.

3. Petitioner contends that his sentence is harsh, cruel, and unusual. However, it is authorized by the statute (*supra*, p. 2) and there is no question of constitutionality. It was, therefore, within the power of the trial court to impose, and affirmance of it was proper.[3]

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[2] *Singer* v. *United States*, *supra*; *Miller* v. *Territory of Oklahoma*, 149 Fed. 330 (C. C. A. 8); and *Coulston* v. *United States*, 51 F. (2d) 178 (C. C. A. 10), relied on by petitioner, do not involve the admission of tax returns or any comparable question and are not in conflict with the decision of the court below.

[3] See *Freeman* v. *United States*, 243 Fed. 353 (C. C. A. 9), certiorari denied, 249 U. S. 600; *United States* v. *Porter*, 96 F. (2d) 773 (C. C. A. 7), certiorari denied, 305 U. S. 612; *Bogy* v. *United States*, 96 F. (2d) 734 (C. C. A. 6), affirming 16 Fed. Supp. 407 (W. D. Tenn.), certiorari denied, 305 U. S. 608; *Russell* v. *United States*, 119 F. (2d) 686 (C. C. A. 8); *Carpenter* v. *United States*, 280 Fed. 598 (C. C. A. 4).

CONCLUSION

The decision below is correct and there is no conflict. The petition should be denied.

Respectfully submitted.

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AUGUST 1942.

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